



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 8, 1996

Ms. Sandra C. Joseph  
Open Records Counsel\Disclosure Officer  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711

OR96-2072

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37022.

The Comptroller of Public Accounts (the "comptroller") received a request for copies of each response to the comptroller's request for information dated April 28, 1995, regarding the Verification of and Recommendations to Agency-Developed Strategies for Implementation of an Integrated Tax System. You claim that the requested information may be excepted from disclosure under section 552.110 of the Government Code. You state that five companies who responded to the request for information have no objection to their information being released to the requestor, and that the comptroller has released those documents to the requestor. You state that six companies have indicated that they hold copyrights to some or all of the material they submitted to the comptroller. Finally, you state that six other companies have indicated that they consider either some or all of their proposals to be excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, this office informed the companies of the request and of their obligation to submit to this office their arguments as to why any exceptions to disclosure apply to the requested information. Only one of the companies, International Business Machines Corporation ("IBM"), replied, claiming that sections 552.101, 552.104, and 552.110 of the Government Code except its material from disclosure. As the other companies did not claim an exception to disclosure, the comptroller may not withhold the material submitted by these companies.

You have noted that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception

applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

We now address IBM's claimed exceptions to disclosure.<sup>1</sup> Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. IBM argues that portions of its proposal are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).<sup>2</sup>

We have reviewed the information submitted by IBM and conclude that the comptroller must withhold the following sections from required public disclosure under the second prong of section 552.110:

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<sup>1</sup>Although IBM has claimed that sections 552.104 and 552.101 except its information from disclosure, we conclude that neither exception applies. Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Therefore, IBM cannot claim this exception to disclosure. Similarly, IBM claims that section 552.101 of the Government Code should except the pricing information from disclosure at least during the pendency of the comptroller's review of the responses to the request for information. However, we are not aware of any statute, judicial decision, or constitutional principle other than those discussed in this ruling that makes this information confidential.

<sup>2</sup>IBM claims that the information requested was submitted "voluntarily," and that its release would cause substantial harm to the vendors. We believe that the information was not submitted "voluntarily," as that term is understood in this context. See, e.g., *Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

Marked information on page 3 of the Section I.

II.1. Introduction

II.1.1. IBM's Understanding of the RFI

II.1.2. IBM's Comments and Recommendations

II.2.1.1. Overall ITS strategy

II.2.1.2. Project quality assurance review

II.2.1.3. Ongoing quality assurance activities

II.2.1.4. Assistance in technical skills transfer and mentoring

II.2.1.5. Post implementation quality assurance review

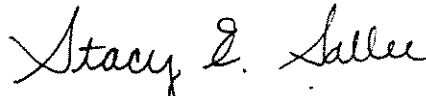
II.3. Quality Assurance Project Team

III. Costs

The comptroller may not withhold the remainder of IBM's proposal.<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 37022

Enclosures: Submitted documents

cc: Mr. Guy A. Schweppe  
Andersen Consulting L.L.P.  
701 Brazos Street, Suite 1000  
Austin, Texas 78701  
(w/o enclosures)

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<sup>3</sup>As IBM claimed the first prong of section 552.110, which addresses trade secrets, for the same information that is protected from disclosure under the second prong of section 552.110, we need not now address IBM's trade secret arguments.

Mr. Darrell Hanshaw  
Vice President  
Sterling Information Group  
P.O. Box 161148  
Austin, Texas 78716-1148  
(w/o enclosures)

Mr. Bob Cooper  
District Manager  
Mr. Bruce Bybee  
State Government Representative  
Sun Microsystems  
6034 W. Courtyard Drive, Suite 200  
Austin, Texas 78730  
(w/o enclosures)

Mr. Michael F. McKenzie  
Vice President  
State and Local Government  
EDS  
905 Southland  
Lansing, Michigan 48910  
(w/o enclosures)

Mr. Bruce H. Kubec  
Account Manager  
AIC  
1033 La Posada, Suite 300  
Austin, Texas 78752  
(w/o enclosures)

Mr. Scott A. Kelly  
Consulting Services  
AmeriData Consulting  
3307 Northland Drive, Suite 210  
Austin, Texas 78731-4942  
(w/o enclosures)

Mr. Barry Gibbons  
Public Sector Executive  
IBM  
301 Congress Avenue  
Austin, Texas 78701  
(w/o enclosures)

Mr. Gary F. Ruhl  
ESKORT Program Manager  
INTEGRIS  
300 Concord Road  
Billerica, MA 01821  
(w/o enclosures)

Mr. Rob S. Welborn  
Vice President  
CW Systems Inc.  
600 Congress Avenue, Suite 3131  
Austin, Texas 78701  
(w/o enclosures)

Mr. Leon Palmer  
Senior Project Manager  
B. R. Blackmarr & Associates  
Chateau Plaza, Suite 1700  
2515 McKinney Avenue, LB-17  
Dallas, Texas 75201  
(w/o enclosures)

Mr. Carl Fijat  
Consulting Service Territory Manager  
Trinzic Corporation  
555 Twin Dolphin Drive, S400  
Redwood City, California 94065  
(w/o enclosures)

Mr. Douglas D. Mueller  
Area Director  
Protellicess  
400 Interstate North Parkway, Suite 800  
Atlanta, Georgia 30339  
(w/o enclosures)

Mr. Alan Godfrey  
Vice President  
Mr. Darrell Hanshaw  
Vice President  
Sterling Information Group  
P.O. Box 161148  
Austin, Texas 78716-1148  
(w/o enclosures)

Mr. Richard L. Crosby  
Vice President  
American Management Systems, Inc.  
4050 Legato Road  
Fairfax, Virginia 22033  
(w/o enclosures)

Mr. Patton G. Lochridge  
McGinnis, Lochridge & Kilgore, L.L.P.  
1300 Capitol Center  
919 Congress Avenue  
Austin, Texas 78701  
(w/o enclosures)